

The 'war on terrorism' v civil liberties



Abstract

The security of the State is of paramount importance to the integrity and wellbeing of a nation and to citizens whose rights and freedoms are protected by the security of the State. However, the rights of citizens may be affected by such powers and there exists the possibility for governments to disappear behind the doctrine of national security with the intention of preventing scrutiny of executive action. This raises two constitutional questions: the extent to which arrangements secure some form of balance between the competing needs of State Security and protection of the individual, and; the way in which, and the degree to which, the government is held accountable for powers exercised in the name of State Security, either through supervision of the courts or through the democratic process (Barnett, 2000).

The focus of this essay is to analyse what this writer perceives as the central problem we are faced with: how to deal with the fact that as a society we cling tightly to our rights and freedoms whilst expecting to enjoy everyday life without fear of terrorist attacks. From the point of view of our government and police force, the law at present is not tight enough to deal with terrorism. How do we deal with this whilst retaining a democratic society? Is security worth having if the price is unacceptable restrictions on our hard-won freedoms? More specifically, this essay proposes to closely scrutinize the government's proposals in order to draw informed conclusions about the perceived challenges to democracy and shed light on these before, as many fear, we find ourselves led like sheep into a dark place. Can

we preserve judicial scrutiny of the restrictions on our freedoms whilst trying to forestall the types of terrorist activity the world has witnessed?

To conclude this section, the final word of this controversy should perhaps be left to Mrs. Thatcher: when we talk of liberties, freedoms and rights, whose are we talking about?

To answer that charge, perhaps I can refer to a letter I received from the mother of a young serviceman who was murdered by the IRA. She said and I quote: ' Where is the freedom of the press? I hear them cry. Where is my son's freedom? (Ewing & Gearty, 1990)

This writer agrees with the view expressed above and, whilst there are certain civil liberties and rights which are non-negotiable, others require compromise. It is necessary to debate the way in which these are safeguarded and secured.

Introduction

This section will provide a brief history of anti-terror legislation, in the United Kingdom. It will then outline the main terms of the debate.

Northern Ireland- The ' Troubles'

The Birmingham bombings in 1974 which were believed to have been carried out by the Irish Republican Army, leaving sixteen people dead and many more injured, prompted the passage of the Prevention on Terrorism (Temporary Provisions) Act 1974, and successive Acts including: the Prevention of Terrorism (Temporary Provisions) Act 1989, the Prevention of Terrorism (additional Powers) Act 1996, the Northern Ireland (Emergency <https://assignbuster.com/the-war-on-terrorism-v-civil-liberties/>

Provisions) Act 1996 and the Northern Ireland (Emergency Provisions Act) 1998 (Bell, 1979). Space does not permit more than a brief overview of the rich and troubled history of Northern Ireland, but it is significant in that it sparked the enactment of the first Terrorism laws.

In 1968, a campaign of civil disobedience and unrest began in Ireland. The reasons for the violence concerned the discrimination which existed against Catholics and the continued union with the mainland (Disturbances in Northern Ireland, 1969). In 1969, British troops were deployed to support the police in matters which had become subject to military control; in 1970, the Provisional Sinn Fein Party was formed and, in 1971, the Reverend Ian Paisley founded the Democratic Unionist Party. Those suspected of being Irish Republican Terrorists became bound by the Civil Authorities Special Powers Act (Northern Ireland) 1922. In January 1972, thirteen Catholic civilians were shot dead by British paratroopers during a banned civil march, known as ' Bloody Sunday,' and by 1974, 472 deaths had taken place by Protestant murderers and the IRA. Allegations of ill treatment of detainees led to proceedings against the United Kingdom by the Republic of Ireland government under the European Convention on Human Rights (hereinafter ECHR). It was ruled that the procedures amounted to inhumane and degrading treatment contrary to Article 3.

Reforms were initiated in an attempt to improve relations between the Catholic community and the Unionist by the Northern Ireland Parliament. However, The Northern Ireland Parliament became prorogued and its powers transferred to a Secretary of State for Northern Ireland. It was confirmed here that there was a need for detention without trial and special courts

were introduced, to sit without the jury. These became known as the 'Diplock courts' (Northern Ireland (Emergency Provisions) Act 1973). In 1973, a new system of power sharing between the Northern Ireland Assembly and the Westminster Parliament was initiated (Northern Ireland Constitutional Proposals, 1973). The Northern Ireland Constitution Act 1973 provided a statutory guarantee that Northern Ireland should remain part of the United Kingdom until the time at which a majority of the people, voting in a referendum, should determine otherwise. In a referendum held in 1973 on the question of the union with the United Kingdom, a majority voted in favour of the continuation of the union. The breakdown of the system resulted in the Northern Ireland Act 1974, which resulted in the restoration of the direct rule by Westminster over Northern Ireland. The legislation also attempted to prevent the discrimination which existed in the fields of housing and employment, but this was to little effect (Chambers, 1987).

Throughout the 1970s and 1980s a civil war existed (Gearty, 1991). From 1971 to 1977 an average of 252 persons were killed and 3, 269 shootings occurred each year. Between 1978- 81, the averages fell respectively, to 82 and 2, 574 (Dickson, 1993). A Constitutional Convention was elected, under the Northern Ireland Act 1974, in an attempt to devolve power to the province. This attempt failed as the Unionist insisted that they hold a majority of the new assembly. A new assembly, designed to be a debating and deliberative forum, was provided for, but dissolved in 1986. The Republic of Ireland Act and the Anglo-Irish Agreement, signed by the Ministers of the United Kingdom was the result of the New Ireland Forum, in 1983. This agreement supported the principle that no constitutional change

concerning the relationship between the north and south could come about other than with the consent of the majority of people in Northern Ireland. In the absence of this consent, it was agreed that closer co-operation in security, economic, social and cultural matters, as well as, the promotion between the two parts of Ireland would be called for, with the help of an Inter-governmental Conference, consisting of representatives from both the north and south. This was to be reviewed after three years, with the sovereignty over Northern Ireland remaining with the United Kingdom. However, in an application for judicial review it was claimed that the Agreement would fetter the powers and duties of the Secretary of State for Northern Ireland. The application was dismissed.

In 1993, a Joint Declaration was signed between the British and Irish governments. The Declaration indicated that the British government had 'no selfish strategic or economic interest' in Northern Ireland, giving effect to the neutrality of the government's position. In 1994, the IRA announced ceasefire and, in response, the government announced that the ban on live sound broadcasts by members of Sinn Fein should be lifted. This ceasefire provided some realignment of judicial practice in support of the language of civil liberties. Gearty notes that, 'for the first time,' decisions such as *DPP v Jones* and *Redmond-Bates v DPP* showed a 'judicial branch sensitive to the underlying importance of the exercise of civil liberties, in the context of association and assembly in the first case and assembly and expression in the second' (Gearty, 2003). However, in 1996 the IRA bombed Canary Wharf in London, ending the ceasefire. At the end of the same year, the British government announced terms for including Sinn Fein in all discussions in

order to reach a settlement. All of these demands were nevertheless rejected by Gerry Adams, President of Sinn Fein.

1997 resulted in the election of the labour government. Following a renewal of ceasefire by the IRA, and Sinn Fein's rejection of the use of force, peace talks commenced between all parties. On Good Friday, 10 April 1998, agreement was finally reached. The agreement concerned the principles that: Northern Ireland would remain part of the United Kingdom, with the Republic of Ireland agreeing to amend its constitution to remove the claim to Northern Ireland; a Northern Ireland Assembly of 108 members was to be elected under a system of proportional representation; a North-South ministerial council was to be established by the Assembly in order to coordinate relations between Ireland and Ulster; a Council of the Isles was to be established, and; all participants expressed the commitment to the disarmament of parliamentary organisations, which was a condition for the devolution of power. Referendums were held in both the Republic of Ireland and Northern Ireland. The 1998 elections for the membership of the Northern Ireland Assembly produced an Assembly with power shared by four main political parties and five minority parties.

In 1999, the devolution of power was complete, and the Assembly elected, and a power sharing executive in its place. When the IRA refused to cooperate, the Assembly was suspended and the power was returned to Westminster, under the Northern Ireland Act 2000.

The Terrorism Act 2000

The Terrorism Act 2000 reformed and extended all previous legislation. The Act repealed the earlier Acts and placed the law on a permanent basis, no longer subject to the restriction of an annual renewal by Parliament. In relation to Northern Ireland, it was hoped that following the peace settlement, special provision would no longer be required. However, due to the problems implementing full devolution to Northern Ireland, special provisions were included in Part VII of the Act which are limited to five years.

Under the Terrorism Act 2000, a wider definition was adopted which was intended not only to cover terrorism for political ends, as in the case of Northern Ireland, but also terrorism undertaken for religious and ideological motivations (Barnet, 2000). The Act covers the proscription of terrorist groups throughout the United Kingdom, the appeals process by which such an order may be challenged, offences relating to terrorist property, and police counter-terrorist powers.

The Anti- Terrorism, Crime and Security Act 2001

It was the terrorist attacks of 11 September 2001 which represented a new dimension of terrorist attack, with suicide bombers striking without warning and their motivation of causing mass casualties. In the heightened response to threat of terrorist attacks, in December 2001, Parliament passed the Anti-Terrorism, Crime and Security Act (hereinafter ATCSA). The Act incorporates measures designed to increase the effectiveness of authorities in combating those directly involved, and those supporting terrorism. Its main provisions will now be briefly discussed: the ATCSA allows the police authority to freeze assets of terrorist organisations and individuals when they pose a threat to

the United Kingdom or its nationals; it permits disclosure of information to security and intelligence agencies, thus improving access to information; it includes a range of provisions, including the power to detain an aircraft for security reasons and the stopping and searching of passengers, as well as the regulation of laboratories of diseases and noxious substances, and; an increase in the range of police powers to photograph, search and examine to establish identity. However, perhaps the most notable introduction is the detainment of suspects without trial, in the basis that they cannot be deported to another country without breaching our human rights legislation, for example, if they might be subjected to torture.

The Prevention of Terrorism Act 2005

In the wake of the bombings which caused death and destruction, on the 7th of July 2005, there was bound to be a danger, that in response, the government would rush out ill-considered measures. It appears, at first sight, to be exactly what has happened. Speaking on the day of the bombings, Prime Minister Tony Blair stated:

It is important ...that those engaged in terrorism realize that our determination to defend our values and our ways of life is greater than their determination to cause death and destruction to innocent people...Whatever they do it is our determination that they will never succeed in destroying what we hold dear in this country and other civilized nations throughout the world (Fox News, 2005).

Most would passionately agree with what we understand the government to mean here: That it must not hand the terrorists a victory by taking away long

held liberties and principles of justice. Why then does Liberty, these few months later, have fundamental concerns about aspects of the new draft Terrorism Bill? Among other measures, the government wants to increase the time police can hold suspects without charge from two weeks to three months, send deportees to countries known to practise torture and introduce a new offence of 'justifying or glorifying terrorism'. The new anti-terrorism legislation comes with Tony Blair stating the existence of 'absolutely compelling' justifications for the crackdown, despite the potential implications for both human rights and civil liberties (Fox News, 2005). To many, however, no justification exists for proposals which demonstrate a willingness on behalf of the government to tamper with the Human Rights Act 1998 (hereinafter HRA) which could jeopardize Britain's adoption of the European Convention on Human Rights (hereinafter ECHR), as well as dangerously undermine centuries of democratic tradition. Contemporary debate on this issue thus centres around the Prevention of Terrorism Act 2005, which came into force on 11 March 2005.

In brief, the Prevention of Terrorism Act 2005 gives the Home Secretary power to make Control Orders in respect of suspected terrorists, whether they are British or foreign nationals. The Control Orders include a range of possible conditions including bans on mobile phones, restrictions on associations with named individuals, and the use of tagging. On the Human Rights website, it is noted that since the government removed the detention provisions of the ATCA and replaced them with Control Orders under the 2005 Act, it is 'once again fully compliant with its international obligations under Article 5.'

Nevertheless, the new Act has been condemned by Liberty for contravening our basic rights to freedom and liberty; saying that 'to allow their erosion, and to give in to intolerance, would give victory to the terrorists.' There are new measures calling for the criminalisation of speech; these vague definitions of prohibited speech raise serious concerns that the measure is overbroad and the punishment without trial provision lives on. The new Act contains the substance of which there are negative implications on our human rights.

Setting the Terms of the Debate

Compelling objections to several of the proposals made are not based solely on the fact that they intrude upon the human rights of every single resident and citizen of this country, but that these measures would have done nothing to stop the attack on London's transport network on the 7th or to prevent future attacks. It is not hard to share the view that the first and best test of any legislation must remain whether or not it will work, but it is suggested alongside Martin Kettle of 'The Guardian'(November, 2005), that whether a Bill is right in every respect can be disputed. This is crucial on a very important conceptual level which relates to the way in which debates on terrorism law are usually conducted: If one takes the view that security considerations must always triumph over those of civil liberty, anything justified by security is acceptable. If, however, one takes the converse view that no restriction of civil liberty is ever acceptable, then every such argument made on behalf of security is an attempt to betray the identity of the democratic state.

The work of the European Community, the United States Supreme Court, judges elsewhere, and the United Kingdom's human rights history to date, reveal that the enactment of a Bill of Rights can be a powerful legal and political weapon in the hands of those who are in danger of having their rights infringed. In this way, the incorporation of the Human Rights Act 1998 (hereinafter HRA), will only be as extensive as the rights which they identify and protect, as powerful as those who draft them, and as commanding as the judges who enforce them and wish to be bound by them.

How will international terrorism influence Parliament's commitment to human rights? Rights will inevitably conflict, and the limits of each will have to be established by political and legal decision. The dilemma is not new, with democratic governments in the past having to strike a balance between the state and individuals: Abraham Lincoln suspended the rights of the habeas corpus in the 19th Century civil war for example (Home Office, 2004). Although Article 5 of European Convention on Human Rights will nowadays provide more protection against unlawful detention than the habeas corpus, this has also been derogated from in light of the Terrorism Acts. Furthermore, under 'Operation Kratos,' an innocent man believed to be a terrorist, was shot dead by police. The basic principle is that if the police deem the lives of the public to be in jeopardy, their shooting to cause death, regardless of whether the person is in fact a terrorist, is justified (July 23, 2005). Is it right that the innocent should be deprived of their human rights, and in this case killed, due to mere suspicion? By contrast, it is worthwhile to recount Operation Flavius (Kitchin, 1989). The murders of three IRA members came before the Court of Human Rights, and in reaching its

decision, the Court considered Article 2 of the Convention (McCann, Farrell and Savage v United Kingdom, 1995). The British forces killed these three terrorists in Gibraltar, as they had believed that a terrorist attack was imminent. The Court ruled that the deprivation of life under Article 2 was justified only where 'absolutely necessary,' and that, accordingly, the use of force was greater than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2. Where is the line attributing to 'absolutely necessary,' to be drawn, and what stage are we to be deprived of our human rights? How will the new legislation affect this?

Chapter 2

This chapter introduces the concepts of the rule of law, civil liberties, human rights and autonomy, analysing the changing approach to these in light of our multi-level constitution.

Before proceeding, it is necessary to briefly explain the concept of the United Kingdom's constitution. In lay terms, a constitution is a set of rules which governs an organisation. The characteristics of the United Kingdom's constitution in summary are that: it is largely unwritten in character; it is flexible in nature; it is supreme; it is unitary in structure, although there is a degree of devolution; it exhibits mainly but not completely separated powers, and; it is monarchical. In discussing terrorism and the powers of our constitution, we are referring to the concept of constitutionalism. The doctrine suggest that: the exercise of power be within legal limits conferred by Parliament on those with power and that those who exercise power are accountable by law; the exercise of power must conform to the respect for

the individual and the individual citizen's rights; the powers conferred on institutions within a State must be dispersed between the various institutions so as to avoid abuse of power, and; the government, in formulating policy, and the legislature, in legitimating that policy, are accountable to the electorate on whose trust the power is held. It is against these conceptual and practical requirements that the constitution of the United Kingdom should be examined.

The Basic Values: Rule of Law; Civil Liberties, Human Rights, & Autonomy

The rule of law represents one of the most challenging concepts of the constitution. There are many rich and varied interpretations which have been given to it, and it is important to recognise that the rule of law ensures limited governmental power and the protection of individual rights and freedoms. Dicey's view on the rule of law, although 'not capable of precise definition,' by his own admission, is as follows: 'It is an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but clear enough in their results' (Dicey, 1959). The spirit of the rule of law is thus the sovereignty or supremacy of law over man: irrespective of rank and status, it is prescriptive, dictating the conduct required by the law, and; protective of its citizens. It is inexplicitly linked with Western democratic liberalism (Neumann, 1986). However, the acceptance of the rule of law is not universally accepted: from a Marxist perspective, the law conceals the injustices of a capitalist system and so denotes a false idealisation of the law, and from the socialist perspective, liberalism pays too much regard to equality and protection of property interests (Lustgarten, 1988.) Despite of such criticisms, and there are many, even within the

Western liberal tradition, the rule of law retains a hold on political and legal perspective: it displays 'enduring importance as a central artefact in our legal and political culture' (Raz, 1977).

In its simplest and general meaning, liberty involves non-interference by others with one's freedom of choice and action. It supports personal autonomy, where the person displays a degree of reflectiveness, self-awareness, and social awareness which allows him or her to form plans and understand their impact on everyone in the immediate social group (Feldman, 2002). However, Dworkin warns that this is only one of many personal and social aptitudes, and is not determinative of a person's self respect (Dworkin, 1988). Recognising and protecting someone's right or liberty, and tolerating their exercise of it, involves a potential cost to other individuals and to the public generally. Seeing individual choices of goods as the highest human good, and the priority of liberty over other values, are therefore highly controversial ideas. Socialist and communitarian theorists have challenged any political theory which places the individual and his or her choices somehow outside society. Rather, it is said that, people's values and choices are shaped by the public good, and liberty is possible only if nurtured by society (Mulhall & Swift 1996). For this reason the term 'human rights,' in this essay, shall refer to those rights which have been enshrined in human rights treaties to all those within a state's jurisdiction. The analysis of what it is to be the bearer of a right is problematic in the case of terrorism where, by definition, intrusion with the freedoms of those inciting terrorism, is defective in the very characteristics that are highlighted by the autonomy theory.

The regulation of matters relating to state security is therefore at risk of state interference that applies to few other human groups. The state may not need to differentiate systematically between these groups, as the traditional approach in the United Kingdom has been to treat liberty as an undifferentiated whole, so that Parliament has a very wide discretion to decide how to balance liberties against each other or against public interests (Feldman, 2002). However differentiated, at first sight the intrusion of liberties is in effect discriminatory and therefore contrary to Article 14 of the European Convention on Human Rights, as it permits the deprivation of liberty, and thus autonomy, on grounds that do not apply to other persons. The most general rhetoric of human rights reinforces this element of uncertainty. Article 1 of the Universal Declaration of Human Rights, begins with the assertion that 'all human beings are born free and equal in dignity and rights.' This could be taken to suggest that, in the area of human rights at least, those inciting terrorism have the same status as everyone else. However, the Declaration then goes on to state that 'they (all human beings) are endowed with reason and conscience and should act towards one another in a spirit of brotherhood,' thereby implicitly introducing an element of uncertainty about the status of those who lack the intellectual and moral reasoning ability upon which the assertion of 'brotherhood' is said to be founded (Hart, 1972). Indeed, the Declaration seems to harbour the basis for depriving those inciting terrorism of fundamental rights; it is often assumed in practice that those who cannot be reasoned with, and those whose deranged minds, render them incapable of making sensible decisions for themselves, and those whose irrational conduct, uninhibited by natural moral inhibitions, makes them threatening to others, must be controlled,

segregated and removed from ordinary social relations, if necessary against their express and vehement protests (Campbell, 1986). Therefore, a state which 'arbitrary kills, imprisons or tortures its citizens so chills the political atmosphere that it cannot be described as democratic, regardless of how free speech formally is or how regularly secret votes are polled: freedom cannot be constructed on such authoritarian foundations' (Gearty, 2003). Certainly, the word 'civil,' from civil liberties, is taken to refer to the way in which liberty contributes to the relationship between the individual and the state in civil society.

Mrs Thatcher said the following about her conservative government's legislative stance on the question of terrorism, which coincides with this argument, in 1988:

Yes, some of those measures do restrict freedom. But those who choose to live by the bomb and gun, and those who support them, can't in all circumstances be accorded exactly the same rights as everyone else. We do sometimes have to sacrifice a little of the freedom we cherish in order to defend ourselves from those who aim to destroy that freedom altogether- and that is a decision we should not be afraid to take. Because in the battle against terrorism we shall never give in. The only victory will be our victory; the victory of democracy and a free society. (Ewing & Gearty, 1990)

An opposing view is uttered by Robert Nozick. Nozick describes Mrs. Thatcher's stance as a 'minimal state,' providing security from internal and external threats, but performing no other functions (Nozick, 1980). This view sees the conservative governments approach as exhibiting what is described

as 'negative liberties:' freedoms from harm, rather than rights to goods (Berlin, 1980). This view sees the state as having no responsibility to take positive steps to ensure that people are able to take advantage of liberties, but only to prevent others from interfering with their liberties (Feldman, 2002). Therefore, the only illegitimate interference with autonomy concerns what other people do to you (Paul, 1982). The conservative government's stance seems to be mirrored with the present governing by Labour. If Nozick is right to criticise such a perspective, how can a replacement be affective against terrorism? What would the alternative involve?

Protecting Rights & Liberty: What is Necessary in a Democratic Society?

Thus it follows that in developed societies: persons inciting terrorism are lawfully excluded from human society and denied autonomy in terms of their personal liberty, self-determination and self-expression. This is licensed by the European Convention on Human Rights (hereinafter ECHR) which states in Article 5(1):

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

The essence of liberty, and terrorism fuelled due to religious reasons, is also contained in Article 9 ECHR:

1. Everyone has the rights to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others.

However, Article 14 warns:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 does not provide a right to non-discrimination per se but, rather, a right not to be discriminated against in relation to the other rights and freedoms protected by the Convention. Therefore, Article 14 enjoys no independent existence; it is tied to other Articles in the Convention (*X v Federal Republic of Germany* 1970).

In assessing what is 'necessary in a democratic society,' the Court will operate according to the 'rich' model of democracy, rather than the majority rule (Feldman, 2002). By virtue of the decided case, *Handyside v United Kingdom* (1976), this means that in honouring the Convention rights, minorities must be protected against unfair treatment and abuse by the majority. This means that any interference with a right must be justifiable on

the basis of: a response to a pressing need to act for that purpose, and; a proportionate response to that purpose (The Spycatcher cases). The definition of proportionality relates to balancing the seriousness of the threat to the interests which are protected within the purposes for which it is legitimate to interfere with that right (McBride, 1999). The margin of appreciation offers a way of arbitrating between claims to state sovereignty in international institutions and the need to universalise human rights standards under international law. These concepts will be discussed more extensively in the latter part of this essay.

The conclusion thus far is that those inciting terrorism are inevitably associated with some deprivation of rights. The law which protects state security is nevertheless viewed with suspicion by democrats and civil libertarians, as the threat to state security can be asserted by those in power to justify restricting freedoms to protect the interests of the governing party, rather than the public (Feldman, 2002). Moreover, governmental demands for security will provoke scepticism.<